# 82-1827



No. ____

IN THE
## Supreme Court of the United States
OCTOBER TERM, 1982

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
*Petitioners*,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

In the Motor Carrier Act of 1980, Congress expressed its intent that "the Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well defined parameters within which it may act pursuant to Congressional policy." The ICC, the statute warns, should not "attempt to go beyond the powers vested in it" by statute (Sections 2 and 3 of the Motor Carrier Act of 1980, 94 Stat. 783). In Section 14 of that Act, Congress established a series of explicit requirements and restrictions governing motor carrier rate bureaus.

Against this background, the question presented by this case is as follows:

> Given Congress's expressed intent to limit the regulatory authority of the Interstate Commerce Commission over rate bureaus by explicitly defining the requirements and restrictions which are to govern them, can the ICC under the guise of "interpreting and implementing" the 1980 Act establish new requirements and restrictions on rate bureaus that Congress did not impose?

## PARTIES TO THE PROCEEDING

The following were original petitioners below and are petitioners here: American Trucking Associations, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau; National Motor Freight Traffic Association, Inc.; New England Tariff Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference. The following were intervenors in support of petitioners below: Alaska Carriers Association, Inc.; Bulk Carrier Conference, Inc.; Drug & Toilet Preparation Traffic Conference, Inc.; Heavy & Specialized Carriers Tariff Bureau; Household Goods Carriers' Bureau, Inc.; Motor Carriers Traffic Association, Inc.; National Association of Specialized Carriers, Inc.; National Small Shipments Traffic Conference, Inc.; Ohio Motor Freight Tariff Committee, Inc.; and Steel Carriers' Tariff Association, Inc. The affiliates of petitioner American Trucking Associations, Inc. are named in an attachment hereto.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## Table of Authorities Continued

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---

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

### OPINIONS AND ORDERS BELOW

The Interstate Commerce Commission and the United States filed a petition for a writ of certiorari in this case which was docketed as No. 82-1643 in this Court on April 7, 1983. References in this petition to "Appendix" will be to the appendix filed with the petition in No. 82-1643.

The opinion of the Court of Appeals, reported at 688 F.2d 1337, appears in Appendix A, 1a-31a, and the judgment appears in Appendix C, 92a-93a. The order of the Court of Appeals denying rehearing appears in Appendix D, 94a-95a. The decisions of the Interstate Commerce

Commission are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092 and 364 I.C.C. 921, and appear in Appendix B, 32a-72a, 73a-84a, and 85a-91a.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983. This petition is filed pursuant to Rule 19.5 of this Court. The petition for certiorari in connection with which this cross-petition is filed was received on April 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTES

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10706, 10762, 11701, and 11705 appear in Appendix E, 96a-100a.

## STATEMENT OF THE CASE

In Ex Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, the Interstate Commerce Commission promulgated a number of rules which purport to interpret and implement certain provisions of Section 14 of the Motor Carrier Act of 1980 governing the operations of rate bureaus. The petitioners include the major motor carrier rate bureaus. These rate bureaus perform their functions under procedures set forth in agreements which are filed with the ICC and which, if they comply with the requirements and restrictions in section 10706(b) of the Interstate Commerce Act, are required to be approved by the ICC. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to

making or carrying out the agreement." 49 U.S.C. § 10706(b).[1]

A typical agreement provides that any person may submit for collective action by the carriers, a proposal to establish or change a rate or rates in the bureau's tariffs. Notice of proposals are regularly distributed to all carrier members of the bureau and to all members of the public who subscribe to the bureau's docket bulletin. All proposals that would effect significant changes in rates are referred to a committee of carrier members.[2] Following a public discussion among carriers, shippers, and any other persons wishing to participate, the committee either approves, disapproves or modifies the proposal. Approved or modified proposals are published in the tariffs.

Each agreement also provides that any member carrier may, in the exercise of its right of independent action, direct the publication in the tariffs for its own account of any rates it desires. The agreements do not provide any means for discussion or voting upon independent action rates in advance of their filing with the ICC. However, the agreements uniformly require advance notice of independent actions prior to their filing.

The rule challenged here would require the carriers to modify their existing agreements to provide that a carrier

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[1] Originally enacted in 1948, the purpose of the Reed-Bulwinkle Act was to provide a means of reconciling any possible conflict between the federal antitrust laws and the National Transportation Policy, 49 U.S.C. § 10101, by providing a lawful means of coordinating carrier activities and fostering just, reasonable, and nondiscriminatory rate structures. See S. Rep. No. 44, 80th Cong., 1st Sess. (1947).

[2] Proposals of a minor nature to which no carrier or shipper objects may be automatically published in the tariffs.

may bypass the procedures set forth in the agreements requiring advance notice of independent actions.[3] Specifically, the ICC required that the agreements be amended to provide that:

> (1) Proponents of independent actions have the absolute right to decide whether or when rate bureaus will docket these actions;
>
> (2) The bureau must comply with the instructions of the proponent of an independent action with regard to whether or not the action should be docketed, and in the absence of explicit instructions shall refrain from docketing until the proposal has been filed with the Commission (Appendix B, 37a, footnote omitted).[4]

This so-called independent action rule was opposed by shippers and carriers alike.[5] The shippers were primarily concerned that the rule would permit carriers to hide rate *increases* in lengthy and complex bureau tariffs and thus prevent shippers from making an immediate response to the increases. The shippers pointed out that unless in-

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[3] This petition involves only the so-called independent action rule. In the Court of Appeals, petitioners challenged several of the rules adopted in Ex Parte No. 297 (Sub-No. 5). The Court held one rule invalid for failure to comply with notice and comment procedures and another invalid as being in conflict with the Interstate Commerce Act, but it upheld the other rules, including the one which is challenged here (Appendix A, 1a-31a).

[4] Docketing, as the Court of Appeals noted, consists of "informing bureau members and the subscribing public of proposed rates prior to submitting rates to the ICC" (Appendix A, 2a).

[5] The vast majority of shippers and carriers who filed statements with the ICC objected to the independent action rule. Two national organizations representing shippers and eight organizations representing carriers intervened in the Court of Appeals in support of petitioners' challenge to the rule.

creases are highlighted in the docket bulletins, they may not be aware of them until the increases take effect. Thus, they may miss the opportunity to request the ICC to reject or suspend and investigate the increases or to make arrangements to obtain the services of a lower-priced carrier. The carriers were primarily concerned that the rule would prevent competing carriers from making an immediate response to rate *decreases* because of the delay inherent in the 30-day filing requirement of the Act.[6] The shippers and the carriers were in total agreement that the rule would not accomplish its stated purpose of enhancing competition. Indeed, as both groups showed, it would have the opposite effect. Nevertheless, the ICC found that "[a]dvance docketing is not essential to the best interest of shippers, carriers, and the general public" (Appendix B, 43a). The Court of Appeals affirmed this finding, holding that "the Commission's independent action rule is but an interpretation of the statutory right of independent action" (Appendix A, 12a). It thus found "no compelling reason to depart from the Commission's interpretation" (Appendix A, 15a).

## REASONS FOR GRANTING THE WRIT

In affirming the ICC's independent action rule, the Court of Appeals "decided a federal question in a way in conflict with applicable decisions of this Court" (Rule 17.1(a)). As this Court has stated, the ICC's rulemaking authority is sharply limited by two constraints. First, the ICC may exercise such authority only to the extent it is

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[6] Pursuant to 49 U.S.C. § 10762(d)(1), a tariff filed with the ICC generally becomes effective only after a waiting period of 30 days. Hence, if a rate decrease is filed without advance notice, competing carriers cannot make an immediate competitive response to the decrease as could competitors in virtually every other industry.

statutorily vested with it. *American Trucking Ass'ns.* v. *United States*, 344 U.S. 298 (1953). Second, the ICC may not use its rulemaking power to create new law. The power to adopt rules is no more than the power "to carry into effect the will of Congress." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976).

The Motor Carrier Act of 1980 was adopted largely in response to the ICC's abuse of these limitations, an abuse of power manifest with respect to its regulation of rate bureaus. In recent years, the ICC has gone on record in favor of severely curtailing the collective ratemaking process.[7] It has attempted to use its rulemaking authority, in furtherance of its efforts to "deregulate" the motor carrier industry, to drastically curtail collective ratemaking. For example, in Ex Parte No. 297 (Sub-No. 3), *Modified Terms and Conditions for Approval of Collective Ratemaking Agreements* (43 Fed. Reg. 1809, January 12, 1978), the ICC proposed to do what Congress had specifically declined to do, namely, apply to motor carrier rate bureaus the severe restrictions on collective ratemaking statutorily imposed on rail rate bureaus by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 49 U.S.C. § 10706(a). And, in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 10706(b) Application Proceedings* (43 Fed. Reg. 1666, January 11, 1978), the ICC undertook to review individual ratemaking agreements to determine if continued approval would be warranted under a new standard adopted by it. The ICC's standard required the parties to an agreement to show not only that the agreement enhanced the goals of

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[7] *Economic Regulation of the Trucking Industry, Hearings on S.2245 Before the Senate Committee on Commerce, Science and Transportation*, 9th Cong., 2d Sess. 1499-1510 (1980) (Statement of Darius W. Gaskins, Jr.).

the National Transportation Policy,[8] the only showing then required by statute, but also that it did not have anticompetitive effects or that, if it did, those effects were outweighed by the benefits to the National Transportation Policy.[9]

When Congress began to deal in earnest with motor carrier regulation and collective ratemaking in 1979, Congressional leaders roundly condemned the ICC's efforts to rewrite the regulatory scheme by rule. For example, on October 22, 1979, the Chairman of the Senate Committee on Commerce, Science and Transportation, which considered the Motor Carrier Act of 1980, expressed the concern of Congress when he said:

> I do not believe that the ICC should embark upon a course of action to redefine completely and unilaterally our national transportation policies. . . . To borrow a phrase, we are mad as hell, and we're not going to take it anymore. It is time that the agencies began to listen to the Congress, and it is time for the Congress to be much more explicit in the direction that it believes Federal Agencies should be moving.[10]

The Motor Carrier Act of 1980 was specially tailored to restrain the ICC from charting its regulatory course outside the boundaries of its governing statute. After giving paramount importance to the need to "reduce unnecessary regulation," the Act sets forth Congress's finding that "the Interstate Commerce Commission should be

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[8] 49 U.S.C. § 10101.

[9] The Ex Parte 297 (Sub-No. 3) and (Sub No. 4), cases were discontinued following enactment of the Motor Carrier Act of 1980.

[10] Address by Senator Howard Cannon, Chairman, Committee on Commerce, Science, and Transportation, United States Senate, to ICC Workshop on Motor Carrier Regulation, October 22, 1979.

given explicit direction for regulation of the motor carrier industry and well defined parameters within which it may act pursuant to Congressional policy." Sections 2 and 3 of the Motor Carrier Act of 1980, 94 Stat. 783. The ICC, the statute warns, should not "attempt to go beyond the powers vested in it" by statute. Section 3(a) of the Motor Carrier Act of 1980, 94 Stat. 783.

The Motor Carrier Act of 1980 gives "explicit direction" to the ICC with respect to the regulation of rate bureaus. As the Court of Appeals noted in its decision:

> Under the old provisions of the Act the ICC exercised sole discretion over the approval of rate bureau agreements. In § 14 of the Motor Carrier Act of 1980, however, Congress enacted a detailed set of statutory restrictions with which motor carrier rate bureaus must comply in order to obtain approval of their agreements from the ICC (Appendix A, 2a).

Section 14 covers such minute details as the time limits for bureau decisionmaking on rate proposals, a requirement that proxies be in writing, a restriction against bureau employees acting on proposals, and a requirement that upon request, the bureau must divulge to any person the name of the proponent of a proposal. In short, Congress itself made both the substantive and the procedural rules which are to govern rate bureaus. Furthermore, Section 14 compels the ICC to approve collective ratemaking agreements that are consistent with the explicit statutory requirements and restrictions unless it finds that an agreement is inconsistent with the National Transportation Policy. Hence, there is no discretion for the ICC to exercise by rulemaking. The House Report confirmed this when it said:

> In other parts of the rate bureau section of the bill, the Committee has proposed to reduce the amount of discretion that the Commission has to approve or

> disapprove rate bureau agreements. This reduction in Commission discretion goes hand-in-hand with the other reforms proposed in the rate bureau process. This is a clear example of Congress defining the limits which it believes the Commission should follow and reducing the discretion of the Commission to expand those limits. When the parties to an agreement meet all the conditions in the section, there is a presumption that the Commission should find the agreement to be in the public interest (H. Rpt., No. 96-1069, 96th Cong., 2d Sess. (1980) at p. 29).

Similar language appears at page 31 of the Senate Report (S. Rep. No. 96-641, 96th Cong., 2d Sess. (1980)).

The ICC's action in adopting the independent action rule exceeds the limits set by Congress. The rule permitting carriers to forbid bureaus to give advance notice of their independent actions finds no predicate in the Motor Carrier Act of 1980. As the Court of Appeals noted in its decision, "[t]he right of independent action was contained in the original Reed-Bulwinkle Act" (Appendix A, 12a). To the extent Congress addressed the right of independent action in Section 14, by adding new Section 10706(b)(3)(B)(ii) to the Interstate Commerce Act, it simply restated what the Reed-Bulwinkle Act has required since its enactment, namely, that the right of independent action be "free and unrestrained,"[11] and codified ICC rules defining the circumstances under which bureaus may change or cancel independent action rates.[12] Since the Section 14 amendments do not alter the *status*

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[11] Former Section 5a(6), former 49 U.S.C. § 5b(6). In the 1978 recodification, the words "free and unrestrained" were changed to "absolute right . . . to take independent action." Former Section 10706(c)(2)(C), former U.S.C. § 10706(c)(2)(C).

[12] See *Notification of Rate Proposals Following Prior Independent Action*, 358 I.C.C. 487 (1978).

*quo* with respect to the docketing of independent actions, the ICC's rule doing so is a plain effort "to go beyond the powers vested in it" by the very explicit terms of Section 14.

In its decision, the Court of Appeals acknowledged that "Congress in the Motor Carrier Act of 1980 intended to restrict significantly the discretion of the ICC to issue regulations enlarging on the motor carrier provisions of the Interstate Commerce Act" (Appendix A, 6a). It further stated that the "Commission's legislative power to prescribe additional conditions for agreement approval has been tempered with the presumption that new conditions the Commission imposes are unnecessary" (Appendix A, 7a). The Court then stated that if "the Commission purports to exercise its delegated authority to create new conditions that have the force of law, then the presumption described above attaches, for the Commission is going beyond the terms of the statute when its own rules are the source of the duty imposed on the rate bureaus" (Appendix A, 7a-8a, footnote omitted). The Court held, however:

> Here the Commission's purpose was to interpret and implement the 1980 Act, not to impose new conditions that go beyond the Act. In its interim notice of rulemaking the Commission stated that "[i]n this proceeding the Commission will interpret and implement [the] new [statutory provision]" 45 Fed. Reg. 55734 (Appendix A, 8a).

The Court concluded that the "presumption discussed above does not apply because the Commission has not attempted to go beyond the statutory conditions" (Appendix A, 9a).

As the above makes clear, the Court's conclusion is based on faulty premises. As shown, the independent action rule finds no predicate in the Motor Carrier Act of

1980. Clearly, therefore, the ICC did not merely "interpret and implement the new statutory provision." It imposed "new conditions that go beyond the Act." Those conditions are obviously intended to "have the force of law," since the ICC ordered the carriers to amend their agreements to conform to them.

The ICC sought to avoid the shortcomings in its rule by claiming that the conditions imposed were not new, *i.e.*, that the right of independent action has always embraced the right of an independent actor to determine docketing procedures when publishing its independent action in a bureau tariff. While it made no findings on this point, and it recognized "that the Commission's position concerning a mandatory, prefiling waiting period has not always been consistent" (Appendix A, 13a, n. 14), the Court placed great emphasis on two 1956 and 1957 ICC decisions which were purportedly "to the effect" that such a waiting period "is advisory only and not mandatory" (Appendix A, 13a). However, the facts do not support the ICC's claim.

First, the ICC-approved ratemaking agreements of the petitioner bureaus as well as all other ICC-approved ratemaking agreements set forth advance docketing procedures in mandatory terms. And, consistent with the ICC's long-held views, the carriers have always considered themselves bound by the terms of their agreements. Thus, as the ICC admitted in its decision here, no carrier has ever sought to exercise a purported right to avoid or ignore approved mandatory bureau procedures (Appendix B, 43a).

Moreover, in 1967, in *Notice of Independent Action*, 332 I.C.C. 22, 23, 29 (1967), the Commission recognized that advance notice of independent actions by rate bureaus is "common practice and one which we have ap-

proved . . ." and that "the Commission has approved the regulations and procedural rules of rate conferences which provide that the conference *will* give notice to its other members of independent action." (Emphasis supplied.) "[T]he mere giving of public notice," the Commission held, "in no way infringes upon the right of a member of a conference to take independent action." 332 I.C.C. at 29-30. On the basis of these findings, the Commission required, without exception or qualification, that notice of independent actions to be published in bureau tariffs be given to the public "to the same extent and in the same manner" that bureau agreements provide for notice of proposals for collective consideration. The Commission further required that all approved Section 5a Agreements be amended to include that rule. 336 I.C.C. at 32.[13] Petitioners therefore submit that the independent action rule is, in fact, a reversal of the past rule and it is a reversal not justified by any provision of the Motor Carrier Act of 1980.

Petitioners further submit that the Motor Carrier Act of 1980 contemplates a continuation of the past rule covering advance notice. Had Congress, which had exhaustively studied rate bureaus and prescribed detailed rules to

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[13] The Court of Appeal's assertion that the rule applies "only when an independent action 'is announced', i.e., docketed" (Appendix A, 14a, n. 14) is plainly wrong. As the ICC's decision makes clear, the rule was drafted with great precision. The wording of the proposed rule set forth in the notice of rulemaking was changed by the hearing examiner in the initial decision, and again by the Commission in the final decision. Had the Commission intended to restrict the rule in the manner suggested by the Court, it would have used the term "docketed." As noted that term has a restricted meaning. That the choice of the broader term "announced" was deliberate is clear from the context of the decision as shown above.

govern them, desired or intended to impose a rule such as that involved here, it obviously would have done so in the statute.

Moreover, specific evidence that Congress approved of the practice whereby bureaus provide advance notice of independent actions is found in Section 11 of the Motor Carrier Act. That section, adding Section 10708(d)(4) to Title 49, provides that although the new zone of rate freedom rates may not be collectively made, and thus are to be handled as independent actions, "the docketing and publication of such rate by the carrier under Section 10706(b) of this title shall not be construed as a violation of the antitrust laws." Docketing, as the Court of Appeal's decision recognizes, consists of "informing bureau members and the subscribing public of proposed rates prior to submitting rates to the ICC" (Appendix A, 2a). Further, only advance notice procedures would implicate the antitrust laws. See *Cement Mfrs.' Protective Ass'n.* v. *United States*, 268 U.S. 586 (1926). Congress, therefore, knew and approved of existing procedures under which "docketing" an independent action to be published in a bureau tariff includes advance notice of such publication to carriers and shippers. Since it chose not to alter the *status quo* with respect to these procedures, the Commission was without authority to do so.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1983

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**ATTACHMENT**

ATTACHMENT

## Affiliates Of American Trucking Associations

American Movers Conference
Common Carrier Conference-Irregular Route
Contract Carrier Conference
Film, Air, & Package Carriers Conference
Munitions Carrier Conference
National Automobile Transporters Association
National Tank Truck Carriers, Inc.
Oilfield Haulers Association
Private Carrier Conference
Regional & Distribution Carriers Conference
Regular Common Carrier Conference
Specialized Carriers & Rigging Association
Steel Carriers Conference
Alabama Trucking Association
Alaska Trucking Association, Inc.
Arizona Motor Transport Association
Arkansas Bus & Truck Association, Inc.
California Trucking Association
Colorado Motor Carriers Association
Motor Transport Association of Connecticut, Inc.
Delaware Motor Transport Association
Washington D.C. Area Trucking Association
Florida Trucking Association, Inc.
Georgia Motor Trucking Association, Inc.
Hawaii Transportation Association, Inc.
Idaho Motor Transport Association
Illinois Trucking Associations, Inc.
Indiana Motor Truck Association, Inc.
Iowa Motor Truck Association, Inc.
Kansas Motor Carriers Association
Kentucky Motor Transport Association, Inc.
Louisiana Motor Transport Association, Inc.
Maine Motor Transport Association, Inc.

Maryland Motor Truck Association, Inc.
Massachusetts Motor Truck Association, Inc.
Michigan Trucking Association, Inc.
Minnesota Motor Transport Association
Mississippi Trucking Association
Missouri Bus & Truck Association
Montana Motor Carriers Association, Inc.
Nebraska Motor Carriers Association, Inc.
Nevada Motor Transport Association, Inc.
New Hampshire Motor Transport Association
New Jersey Motor Truck Association
New Mexico Motor Carriers' Association, Inc.
New York State Motor Truck Association
North Carolina Motor Carriers Association, Inc.
North Dakota Motor Carriers Association, Inc.
Ohio Trucking Association
Associated Motor Carriers of Oklahoma, Inc.
Oregon Trucking Association, Inc.
Pennsylvania Motor Truck Association
Rhode Island Truck Owners Association, Inc.
Motor Transportation Association of South Carolina, Inc.
South Dakota Trucking Association
Tennessee Motor Transport Association
Texas Motor Transportation Association
Utah Motor Transport Association
Vermont Truck & Bus Association, Inc.
Virginia Highway Users Association, Inc.
Washington Trucking Associations, Inc.
West Virginia Motor Truck Association
Wisconsin Motor Carriers Association
Wyoming Trucking Association, Inc.

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*ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the Interstate Commerce Commission acted inconsistently with its governing statute or abused its discretion in concluding that rate bureaus may not prevent members wishing to take independent action by making individual rate changes from having those rate changes filed with the Commission without prior notice to other bureau members.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:



Statutes and regulation:

Page

Statutes and regulation—Continued:



Miscellaneous:

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**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-31a)[1] is reported at 688 F. 2d 1337. The decisions of the Interstate Commerce Commission (App. 32a-72a, 73a-84a, 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092, and 364 I.C.C. 921.

## JURISDICTION

The judgment of the court of appeals (App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (App. 94a-95a). The petition for

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[1]The government has petitioned for a writ of certiorari in this case on unrelated issues in *Interstate Commerce Commission* v. *American Trucking Associations*, No. 82-1643. "App." refers to the appendix filed with that petition.

a writ of certiorari in No. 82-1643 was filed on April 7, 1983. This cross-petition was filed on May 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Under the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10101 *et seq.*, carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. A tariff filed with the Commission generally becomes effective only after a waiting period.[2] Since 1948, motor carriers subject to regulation by the Commission have been authorized to enter into rate agreements with other carriers (Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 *et seq.*, now codified at 49 U.S.C. (Supp. V) 10706(b)).[3] The carriers have established rate bureaus to facilitate the negotiation of collective rates, and to act as their members' agents in submitting to the Commission tariffs containing those rates as well as rates established by their individual members. The carriers' activities in a rate bureau do not violate the antitrust laws so long as the agreement establishing the bureau has been approved by the Commission, and the carriers' actions conform to the agreement. See *Motor Carriers Traffic Association* v. *United States*, 559 F.2d 1251, 1253-1254 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

A key provision of the Reed-Bulwinkle Act was the requirement that all rate bureau procedures for collective ratemaking provide to each party "the free and unrestrained

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[2]The waiting period for railroad rates is 20 days (10 days for reductions), 49 U.S.C. (Supp. V) 10762(c)(3), and motor carrier rates become effective after 30 days. 49 U.S.C. (Supp. V) 10762(a)(2). The Commission, however, has the power to shorten the waiting period. 49 U.S.C. (Supp. V) 10762(d)(1).

[3]Although the Reed-Bulwinkle Act also applies to rail carriers (49 U.S.C. (Supp. V) 10706(a)), this case involves only motor carriers and shippers.

right to take independent action either before or after any determination arrived at through such procedure."[4] Thus, although Congress permitted the bureaus to set rates collectively, it also expressly preserved each bureau member's absolute right to bypass bureau procedures and file its rates entirely free of bureau interference.

Until Congress enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, 49 U.S.C. (Supp. V) 10101 note *et seq.* ("1980 Act"), the Commission had broad authority to define the conditions under which it would approve rate bureau agreements (49 U.S.C. 5b(2)). In Section 14 of the 1980 Act (94 Stat. 803), however, Congress enacted specific statutory restrictions with which motor carriers must comply if they wish to maintain their antitrust immunity (49 U.S.C. (Supp. V) 10706(b)(3)). These statutory restrictions include a provision that gives renewed emphasis to the guarantee of the "absolute right" of independent action: Section 14 provides that a bureau "may not interfere with each carrier's right of independent action." 49 U.S.C. (Supp. V) 10706(b)(3)(B)(ii). This restriction affirms Congress's intent to "place[] strict limitations upon rate bureau treatment of independent actions of member carriers." H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 30 (1980).

2. The Commission implemented Section 14 with the rules adopted in *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, Ex Parte No. 297 (Sub-No. 5) (ICC Dec. 19, 1980) (App. 32a-72a). Although the rules cover a wide variety of subjects, petitioners' sole challenge in this Court is to a rule giving carriers proposing independent rate

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[4]Former Section 5a(6), 49 U.S.C. 5b(6). When the Interstate Commerce Act was recodified without substantive change in 1978, the words "free and unrestrained right" were changed to "absolute right" (49 U.S.C. (Supp. II) 10706(c)(2)(C)). That formulation was retained in the Motor Carrier Act of 1980 (49 U.S.C. (Supp. V) 10706(d)(2)(C)).

changes the right to prohibit the bureau from giving advance notice of their independent actions to other carriers and shippers before the rate is filed with the Commission (App. 35a-46a). In promulgating the rule, the Commission referred to the general rate bureau practice, known as "docketing," under which the bureau notifies shippers and the bureau's carrier members of an independent action by an individual carrier before the bureau files the rate with the Commission on behalf of the individual carrier (App. 38a). The Commission recognized that docketing permits other carriers to join in an independent action before the independently set rate becomes effective (*ibid.*). Because the Commission wanted to preserve for the carrier competitive advantages that might flow from being the first carrier to implement a new rate, the Commission adopted a rule making it clear that the individual carrier, and not the bureau, will decide whether an independent action should be docketed. Thus, while the Commission did not prohibit docketing individual actions,[5] it concluded (*id.* at 37a, 38a, 41a) that a rate bureau should not be able to *require* docketing of independent actions, but should accord the individual carrier complete freedom to determine how much notice, in addition to the statutory 30 days notice (see note 2, *supra*), should be given.[6] In sum, docketing could continue only if agreed to by a carrier taking independent

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[5]The Commission's interim rules had suggested a ban on docketing, publication, circulation, or discussion of independent actions in advance of Commission filing. However, after the majority of those commenting on the interim rules opposed this proposal, the Commission decided against a total ban (App. 36a-37a).

[6]The Commission explained (App. 38a-39a) that although a bureau under the old law would have had to obey an independent actor's instruction to publish an independent action without prior notice, rate bureau agreements in effect prior to the 1980 Act generally incorporated provisions for the advance notice docketing procedure.

action and the bureaus were prohibited from disobeying a carrier's direction that its independent action not be docketed.

3. The court of appeals affirmed the independent action rule (App. 10a-15a). The court concluded (*id.* at 14a) that the rule comports with Section 14 because mandatory docketing is a restriction on the right of independent action, and the statute is intended to limit opportunities for collective ratemaking and encourage "more independence in formulating individual rates." Noting that "the operation of rate bureaus and the competitive conditions of the transportation industry are matters within the special expertise of the ICC" (App. 14a-15a) the court found that the rule is consistent with past agency practice on docketing (*id.* at 13a) and reflects "thorough consideration of the competing" factors (*id.* at 14a).

## ARGUMENT

The court of appeals correctly affirmed the Commission rule barring rate bureaus from requiring the docketing of independent actions. That aspect of the decision conflicts with no decision of this Court or any court of appeals and presents no legal issue of general importance warranting this Court's review. Although, as we explain in our petition in No. 82-1643, we believe that other aspects of the decision below do warrant further review, that review would not be illuminated by consideration of the completely unrelated issue raised in this cross-petition.

Petitioners contend (Pet. 5-11) that the independent action rule is unlawful because it is an entirely new requirement that goes beyond the specific restrictions imposed by Section 14 of the 1980 Act. However, as the court of appeals found, the rule is "but an interpretation of the statutory right of independent action" that comports with congressional intent and is consistent with prior practice (App. 12a, 14a).

Section 14 specifies that rate bureaus "may not interfere with each carrier's right to independent action" (49 U.S.C. (Supp. V) 10706(b)(3)(B)(ii)). Moreover, as petitioners

readily acknowledge (Pet. 9), the independent action right must be "absolute" and "free and unrestrained." Thus, if any practice restricts the right of independent action, the 1980 Act prohibits it. Mandatory docketing of independent actions is contrary to Section 14. It necessarily forces carriers either to give advance notice to competitors and thereby forgo the competitive advantage of being first with a rate reduction, or to file their independently established rate on their own (rather than through the bureau). See App. 38a. Because mandatory docketing gives the rate bureau the power to override an individual carrier's wishes that no advance notice be given, the court of appeals was entirely correct when it held "[r]equiring carriers who undertake independent action through bureau filing to docket their rate proposals is reasonably viewed as a restriction of the freedom of independent action" (*id.* at 14a).[7]

Petitioners assert (Pet. 11-12) that rate bureau agreements have traditionally required docketing, and that the Commission itself has by regulation ordered mandatory docketing. The court below, however, correctly recognized that the independent action rule is consistent with—not contrary to—prior practice (App. 12a-14a). The Commission in 1956 and again in 1957 explicitly barred mandatory docketing.[8] Petitioners misinterpret 49 C.F.R.

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[7]Petitioners claim (Pet. 13) that Section 11 of the 1980 Act (94 Stat. 801), 49 U.S.C. (Supp. V) 10708(d)(1), contemplates mandatory docketing. But Section 11 simply provides antitrust immunity *if* carriers docket rates proposed under the zone of rate freedom created by 49 U.S.C. (Supp. V) 10708. Neither Section 11 nor any other section of the 1980 Act *requires* docketing. To the contrary, Section 11, like the Commission's independent action rule, merely permits it.

[8]*Intercoastal Steamship Freight Association—Agreement*, 297 I.C.C. 759, 762 (1956); *Southern Motor Carriers—Agreement*, 297 I.C.C. 603, 609-610 (1956); *Central States Motor Common Carriers—Agreement*, 299 I.C.C. 773, 778-779 (1957). To retain members' unrestrained freedom to take independent action, the Commission also has struck down

1331.5 (1969),[9] which simply requires that when an independent action is announced, *i.e.*, docketed, notice must be given to shippers and carriers alike.[10] There is no indication in the agency's decision adopting the regulation[11] that the Commission intended to overrule its several prior cases

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agreement provisions that dictate the kind of tariff (bureau or individual) a carrier could use to publish independent actions, *Rocky Mountain Motor Tariff Bureau, Inc.—Agreement*, 293 I.C.C. 585, 594-596 (1954), and prohibited bureaus from filing administrative protests against their members' independent actions. *Rate Bureau Investigation*, 351 I.C.C. 437, 459-460 (1976), aff'd *sub nom. Motor Carrier Traffic Association* v. *United States*, 559 F.2d 1251 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

[9]That regulation states in pertinent part:

> When independent action is announced and tariff publication is to be made by a [rate bureau] * * *, notification thereof will be given by the [bureau] to the same extent and in the same manner that the [bureau] gives notice of [collective] actions.

[10]Petitioners apparently believe (Pet. 12 & n.13) that use of the word "announced" rather than "docketed" in the regulation indicates that 49 C.F.R. 1331.5 (1969) requires docketing of independent actions. But the court of appeals correctly explained (App. 13a-14a n.14):

> The purpose of this rule was to require rate bureaus to give notice to the shipping public of independent actions, as they were already required to do of collective actions, because notice to the shipping public was deemed essential for collective actions and docketed independent actions have the potential of taking on the character of collective actions. *See Notice of Independent Action*, 332 I.C.C. 22 (1967). Thus, the Commission in its decision construed this regulation to apply only where an independent action is docketed; in such a case notice must be given equally to shippers as to other carriers. 46 Fed. Reg. 30095. Where independent action is not docketed, there is no opportunity for the rate to become collective action, and therefore the regulation does not apply. Thus construed, the regulation is not inconsistent with the independent action rule.

Moreover, even if this were not the case, the Commission's present rule, which is consistent with Section 14 of the 1980 Act, would clearly take precedence over 49 C.F.R. 1331.5.

[11]*Notice of Independent Action*, 332 I.C.C. 22 (1967).

explicitly banning mandatory docketing, or that it was even addressing the issue of mandatory docketing. To the contrary, the decision simply accepted the fact of permissive docketing and then addressed the problem created when such docketing effectively converts independent actions into collective ones.

In any event, even assuming arguendo that the independent action rule can be considered a reversal of past policy as petitioners claim (Pet. 12), the Commission is "neither required nor supposed to regulate the present and future within the inflexible limits of yesterday." *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). Rather, the Commission is free to interpret the public interest in a manner different from the interpretations of the past.[12] Contrary to petitioners' bald assertions (Pet. 6-7), the Commission retains authority to promulgate regulations to implement the Section 14 restrictions on rate

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[12]Petitioners urge (Pet. 9-10) that because new Section 10706(b)(3)(B)(ii) essentially restated the Reed-Bulwinkle Act requirement that the right of independent action be "free and unrestrained," the Commission lacked the authority to promulgate a new independent action rule. They also contend (Pet. 12-13) that the Motor Carrier Act of 1980 "contemplates a continuation of the past rule" because if Congress had "desired or intended to impose a rule such as that imposed here, it obviously would have done so in the statute." Neither claim has merit. It is well settled that a decision to reenact a clause without change indicates simply that the prior policy is within the realm of acceptable agency action, and not that such policy is the only way to implement a statutory scheme. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350-352 (1953); *Nueces County Navigation District No. 1* v. *ICC*, 674 F.2d 1055, 1064 n. 9 (5th Cir. 1982), cert. denied, No. 82-341 (Nov. 29, 1982). Congress has never indicated that the Commission should require the rate bureaus to docket independent action. The Commission accordingly had the authority to make clear, in a rulemaking proceeding, that such docketing may not be mandatory.

bureaus and rate bureau agreements. See 49 U.S.C. (Supp. V) 10321(A).[13] Because the independent action rule "(c)learly * * * increases the prerogative of the independent actor" (App. 14a), it is consistent with Section 14 and an appropriate exercise of agency discretion.

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[13]Petitioners contend (Pet. 7) that in the 1980 Act Congress "roundly condemned the ICC's efforts to rewrite the regulatory scheme by rule." There is, as the court below recognized (App. 7a-9a), no such effort here; the Commission has simply promulgated regulations to implement Section 14. Petitioners have, in any event, mischaracterized the legislative history. In discussing the new Section 14, neither the House nor the Senate Report contains any criticism of the Commission's exercise of its authority to approve rate bureau agreements under the earlier statutes. H.R. Rep. No. 96-1069, *supra*, at 27-30; S. Rep. No. 96-641, 96th Cong., 2d Sess. 12-15, 30-32 (1980). Instead, the reports note that "the Commission has recently embarked upon a series of reviews of rate bureau agreements to determine whether they should be continued and, if so, under what conditions." H.R. Rep. No. 96-1069, *supra*, at 27; S. Rep. No. 96-641, *supra*, at 13. Congress adopted the only Commission action it identified as resulting from the review, albeit on a somewhat different time schedule (*ibid.*). Moreover, the Senate Report notes (at 31-32) that several of the new statutory requirements (see page 3, *supra*) are based on Commission decisions and regulations.

## CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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